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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MERLING SUSANA LOPEZ,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

CASE NO. 11-02677 R (SHx)

**UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW**

The Honorable Manuel L. Real

On March 19, 2012, this Court granted defendant United States of America’s (“United States” or “Defendant”) motion for summary judgment. (Dk. no. 28.) The Court ordered that “Defendant shall submit proposed uncontested facts and conclusions of law, a proposed order and a proposed judgment.” (*Id.*) Pursuant to the Court’s order, the United States hereby submits the following [Proposed] Uncontested Facts and Conclusions of Law.

UNCONTROVERTED FACTS

1. On March 18, 2008, Plaintiff, who was 24 years old at the time, presented herself to Clinicas Del Camino Real, Inc. (“Clinicas”), an entity receiving federal funds under the Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. § 233(g), as amended by the Federal Supported Health Centers Assistance Act of 1995 (P.L. 104-73), for a pre-employment physical examination.

2. During the evaluation process it was determined that Plaintiff required a hepatitis B vaccine, a MMR vaccine, and a PPD TB screening test.

3. Plaintiff underwent a physical examination which revealed no abnormalities except for mild myopia.

4. Plaintiff denied any significant past medical history.

5. Following the examination, the vaccinations and TB test were administered to Plaintiff while standing.

6. Upon receiving the third vaccination, Plaintiff fainted, fell to the ground, and suffered injury to her jaw.

7. Plaintiff filed this lawsuit on March 30, 2011.

8. On June 9, 2011, the Court substituted the United States in place of Clinicas and a Clinicas employee.

9. Plaintiff never provided the United States with an expert report.

10. The United States submitted the declaration of its expert, Ricardo G. Hahn, M.D., a professor at the University of Southern California, and physician for 36 years. Dr. Hahn's practice administers immunizations on a daily basis to infants, children, and adults. His practice supports a large training program where preventive medical services are integral to the clinical practice, and supports a number of local, state, and federal programs related to vaccination surveillance.

1 11. Dr. Hahn has participated on the Advisory Committee on
2 Immunization Practices (ACIP) for the federal Centers for Disease Control and
3 Prevention (CDC) as well as the American Academy of Family Physicians
4 (AAFP).

5 12. On February 16, 2012, the United States moved for summary
6 judgment on the grounds that Plaintiff had failed to designate an expert witness to
7 opine on the standard of care in administering immunizations, and submitted the
8 declaration of its expert, Dr. Hahn.

9 13. On February 24, 2012, Plaintiff opposed the United States' motion but
10 failed to submit a declaration from an expert witness on the standard of care.

12 14. On February 27, 2012, Plaintiff purported to file a declaration from a
13 Dr. Steven Jacobs. The declaration, however, was from Plaintiff.

14 15. Plaintiff never filed a declaration with the Court from an expert
15 witness.

16 16. Plaintiff, however, served a declaration from Dr. Jacobs on the United
17 States, and the United States' counsel filed it as an exhibit to a declaration in
18 support of its reply brief on March 5, 2012.

19 17. Plaintiff served the declaration of Dr. Jacobs by mail on February 28,
20 2012, after the discovery period had expired on February 27, 2012.

21 18. The declaration of Dr. Jacobs purported to have a curriculum vitae
22 attached to it, but it did not have a curriculum vitae attached to it.

23 19. Plaintiff's counsel presented the Court with Dr. Jacobs' curriculum
24 vitae at the hearing on March 19, 2012. The Court reviewed Dr. Jacob's
25 curriculum vitae and concluded that it did not demonstrate that Dr. Jacobs was
26 qualified to render an expert opinion on the standard of care in administering
27 immunizations.

CONCLUSIONS OF LAW

20. In a medical malpractice action, expert testimony is required to establish negligence (*i.e.*, breach of an applicable medical standard of care) and causation. *Brown v. Colm*, 11 Cal. 3d 639, 642-43 (1974); *Willard v. Hagemeister*, 121 Cal. App. 3d 406, 412 (1981); *Gami v. Mullikin Medical Center*, 18 Cal. App. 4th 870, 877 (1993). Absent medical testimony sufficient to prove these elements, Plaintiff's claims must fail.

21. Untoward results alone are not enough to render physicians liable.
Huffman v. Lindquist, 37 Cal. 2d 465, 473 (1951).

22. A claim of medical malpractice must be supported by expert testimony. *Brown v. Colm*, 11 Cal. 3d 639, 642-43 (1974)

23. The standard of care requires a physician to exercise that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other physicians in similar circumstances. *Brown*, 11 Cal. 3d at 642-43.

24. Only a medical expert knows the applicable standard of skill, knowledge and care in the relevant community. *Willard v. Hagemeister*, 121 Cal. App. 3d 406, 412 (1981).

25. Because Plaintiff never filed a declaration from a medical expert opining on the standard of care, she has failed to comply with Local Rule 7-9 to submit all evidence in support of an opposition twenty-one (21) days before the date designated for the hearing of the motion.

26. Although the United States filed a declaration from Dr. Jacobs as an exhibit in support of its reply brief, Plaintiff failed to submit Dr. Jacobs' curriculum vitae. Plaintiff therefore has not explained how Dr. Jacobs is qualified "by knowledge, skill, experience, training, or education" under Fed. R. Evid. 702 to render an expert opinion.

1 27. The burden of laying the proper foundation for the admission of
2 expert testimony is on the party offering the expert. *Allison v. McGhan Med.*
3 *Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

4 28. Although Dr. Jacobs is indisputably a retained expert under Fed. R.
5 Civ. P. 26(a)(2), Plaintiff failed to provide Defendant with an expert report from
6 Dr. Jacobs or any other expert.

7 29. The declaration of Dr. Jacobs is therefore stricken, and Dr. Jacobs is
8 precluded from testifying in this action due to Plaintiff's failure to properly
9 designate him as an expert and provide an expert report. Fed. R. Civ. P. 37(c)(1);
10 *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005) ("Parties
11 must understand that they will pay a price for failure to comply strictly with
12 scheduling and other orders, and that failure to do so may properly support severe
13 sanctions and exclusions of evidence.").

14 30. In any event, Dr. Jacobs' curriculum vitae fails to demonstrate that he
15 is qualified to provide an expert opinion on the standard of care in administering
16 immunizations.

17 31. Defendant's expert, Ricardo G. Hahn, M.D., a professor at the
18 University of Southern California, and physician for 36 years, is qualified to offer
19 an expert opinion. His practice administers immunizations on a daily basis to
20 infants, children, and adults, and supports a large training program where
21 preventive medical services are integral to the clinical practice, and supports a
22 number of local, state, and federal programs related to vaccination surveillance.
23 Dr. Hahn has also participated on the Advisory Committee on Immunization
24 Practices (ACIP) for the federal Centers for Disease Control and Prevention (CDC)
25 as well as the American Academy of Family Physicians (AAFP)

26 32. Dr. Hahn, opined that the treatment Plaintiff received at Clinicas met
27 the standard of care:

1 It is the standard of practice throughout the nation to administer
2 vaccinations to adults in a standing and/or sitting position. Given the
3 absence of any risk factors, the young age of the patient, and the
4 nature of the visit, there were clearly no contraindications to
5 administering vaccinations to a standing patient.

6 33. Dr. Hahn concluded that Clinicas did not breach the standard of care
7 “[e]ven though Ms. Lopez sustained a non-displaced fracture of the mandible”
8 because:

9 [T]he events leading to the fracture and the care provided by the clinic
10 did not violate the standard of practice and falls within the standards
11 acceptable for the immunization practices promulgated by the United
12 States Centers for Disease Control and Prevention and its Advisory
13 Committee on Immunization Practices (ACIP) which has been for a
14 number of decades the entity whose recommendations have been
15 universally accepted in immunization practice.

16 34. Dr. Hahn determined that the “care provided to Ms. Lopez by Clinicas
17 Del Camino Real fell within the standard of practice applicable to our community.”

18 Dated: APRIL 4, 2012.



21 MANUEL L. REAL
22 U.S. DISTRICT JUDGE